No. 261 Sp

Brf. of Samuels for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Feb. 24. 1902.

No. 262.

EDWARD H. CLARKE,

Petitioner,

vs.

WILBUR LARREMORE, Trustee in Bankruptcy of RAYMOND W. KENNEY,

Bankrupt.

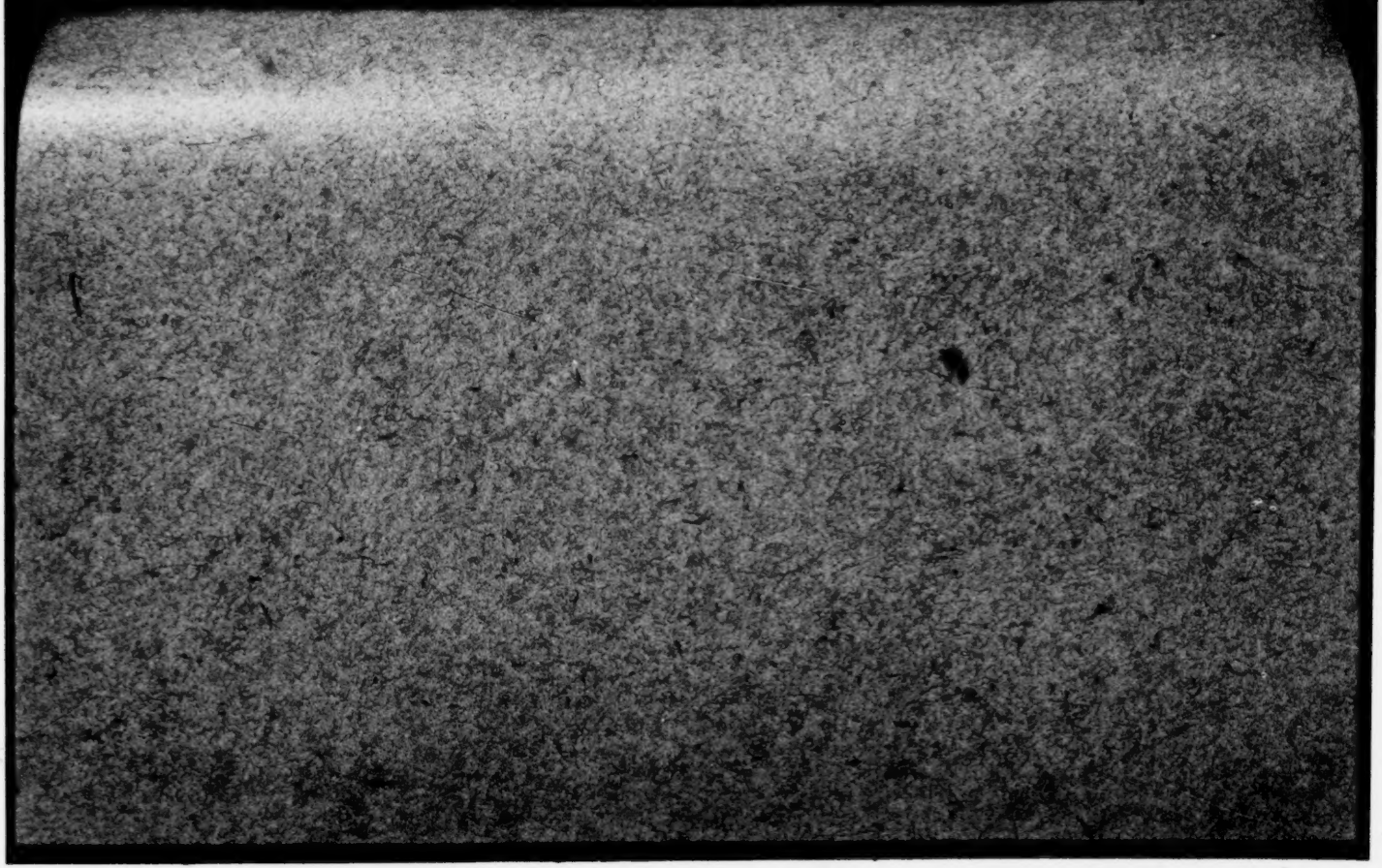
BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

S. Lawrence Samuels,

Counsel for Edward H. Clarke,

Petitioner.



In the Supreme Court of the United States,

OCTOBER TERM, 1901.

EDWARD H. CLARKE, Petitioner, against WILBUR LARREMORE, Trustee in Bankruptcy, of RAYMOND W. KENNEY, Bankrupt.	No. 262.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER.

Statement of Case.

This record comes here on certiorari to the U. S. Circuit Court of Appeals for the Second Circuit, to review an order affirming two orders of the U. S. District Court for the Southern District of New York, dated respectively July 20th, 1899, and November 25th, 1899, which directed the Sheriff of the County of New York to pay over to Wilbur Larremore, the trustee in bankruptcy herein of

Raymond W. Kenney, Bankrupt, the sum of $12,451.09 in his hands, made by him under an execution against the bankrupt.

On January 23d, 1899, petitioner was the owner of certain notes made by the bankrupt, Kenney, to Helen L. Kenney, and endorsed and transferred by the latter to the petitioner, and on said day he commenced an action thereon in the Supreme Court of the State of New York against Kenney, and thereafter, on March 6th, 1899, he recovered judgment for the sum of $20,906.66, and caused an execution to be delivered to the Sheriff of the County of New York (Rec. p. 7).

The execution was levied upon a stock of goods and fixtures belonging to Kenney and used in his business as a fur merchant, in the City of New York, and they were sold by the Sheriff on March 15th, 1899, and realized the sum of $12,451.09, which is the money in controversy herein (Rec., p. 7).

Shortly after the levy of the execution by the Sheriff, one Leon Abbett, procured a warrant or writ of attachment against the property of the said Kenney, from the Supreme Court of the State of New York, and caused the same to be levied upon the stock and fixtures above mentioned. Immediately thereafter he commenced a suit for a permanent injunction in the Supreme Court, in aid of his attachment, against Clarke, to restrain the enforcement of the latter's judgment, claiming that his debt was a fraudulent one, and in that action he obtained *ex parte*, a temporary injunction restraining the Sheriff from paying over the said sum of money to Clarke. Upon the hearing of a motion to dissolve this injunction, the Supreme Court decided that the debt was valid and honest, and made an order dissolving the injunction (Rec. 28). Upon the same day, April 13, 1899, that this

order was entered, and before the Sheriff could pay over the money to the execution creditor, a petition in bankruptcy was filed against Kenney in the U. S. District Court for the Southern District of New York, at the instigation of said Abbett (Rec. 29), and the Hon. Addison Brown, Judge of said Court, issued an order restraining the Sheriff from paying over the said money in his hands to the execution creditor, Clarke (Rec. 10, 13).

Before the election of the present trustee, Judge Brown made the order of July 20th, 1899, above mentioned, directing the Sheriff to pay over the money in his hands to the Trustee when the latter should be elected and have qualified (Rec. 34), and handed down an opinion which is reported at page 65 of the record, and in 95 Fed. Rep., 427.

Thereafter the creditors elected the present trustee (Rec. 57), who thereupon made a motion for an order directing the Sheriff to pay over to him the money in his hands (Rec. 37). After a hearing of all the parties interested, Judge Brown granted the order prayed for, which is dated November 25th, 1899 (Rec. 62), and delivered an opinion which is contained at page 66 of the record, and in 97 Fed. Rep., 554. The execution creditor, Clarke, thereupon filed a petition with the U. S. Circuit Court of Appeals for the Second Circuit, for a review of the two orders above mentioned, and said Court, after a hearing of the petition, made an order affirming the said orders of Judge Brown (Rec. 75), and handed down an opinion which will be found at page 72 of the record, and in 105 Fed. Rep., 897.

Thereafter, upon application of the execution creditor, a writ of certiorari was granted by this Court, to review the said order of the Circuit Court of Appeals (Rec. 80).

It was claimed by the petitioner, Clarke, both before the District Court and the U. S. Circuit Court of Appeals, that although his execution was levied within four months prior to the filing of the petition in bankruptcy against Kenney, yet, that since he had reduced the goods levied on to money before that time, the same was no longer the property of the bankrupt, and did not pass to the trustee under the provisions of Section 67, "*f*" of the Bankrupt Act, but belonged to him, as execution creditor.

This point was overruled by the District Court and the Circuit Court of Appeals.

Assignment of Error.

For error, the petitioner says that the Court erred in rendering judgment against him on the ground that the money in controversy herein is not subject to the provisions of the Bankrupt Law.

ARGUMENT.

POINTS.

I.

The sheriff having sold the goods levied on before the filing of the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt, at the time of the adjudication, and the trustee, therefore, has no title to the same.

(*a*) *The object of the law is to annul liens only, existing at the date of adjudication.*

The application of the trustee for the payment to him of the money in the Sheriff's hands was made under the provisions of Sec. 67, subdivision *f*, of the Bankrupt Act, and he prayed therein that the right under the judgment, execution and levy of Clarke, should be preserved for the benefit of the estate of the bankrupt, and should pass to him as trustee, and that the Sheriff should pay over the proceeds of the execution sale in his hands (Rec. 36).

Section 67, Subdivision "f," of the Act is as follows:

"That all levies, judgments, attachments or other "liens, obtained through legal proceedings against "a person who is insolvent, at any time within four "months prior to the filing of a petition in bank-"ruptcy against him, shall be deemed null and void "in case he is adjudged a bankrupt, and the prop-"erty affected by the levy, judgment, attachment, "or other lien, shall be deemed wholly discharged "and released from the same, and shall pass to "the trustee as a part of the estate of the bank-rupt, unless the Court shall, on due notice, order "that the right under such levy, judgment, attach-"ment, or other lien shall be preserved for the ben-"efit of the estate; and thereupon the same may "pass to and shall be preserved by the trustee for "the benefit of the estate as aforesaid. And the "Court may order such conveyance as shall be nec-"essary to carry the purposes of this section into "effect. *Provided*, that nothing herein contained "shall have the effect to destroy or impair the title "obtained by such levy, judgment, attachment, or "other lien, of a *bonâ fide* purchaser for value who "shall have acquired the same without notice or "reasonable cause for inquiry."

This paragraph refers to the day of the adjudication of bankruptcy, and makes such *adjudica-*

tion, and not the *filing of the petition*, the act which effects the dissolution or nullification of the judicial liens mentioned. A similar provision is made by Sec. 67, subdivision *c*, which involves the same subject matter.

The main idea expressed by subdivision *f* is, that if there be in existence, at the time of the adjudication in bankruptcy, property to which the debtor *then* has title on which there rests at the time one of the judicial liens mentioned, such lien shall be dissolved or rendered null and void by the decree of adjudication, and the property shall therefore pass to the trustee, freed from the operation of that lien, unless the Bankruptcy Court shall, in its discretion, order the lien to be preserved for the benefit of the estate, in which event the *lien* will pass to the trustee, and he can enforce it for the benefit of the estate. That idea is also expressed by subdivision *e*. The Bankruptcy Court must investigate the history of the then existing lien to see whether it has been created within four months prior to the time of the filing of the petition in bankruptcy. If it has existed for more than that length of time it is not affected by the adjudication. If it has been created within the four months, then the adjudication nullifies it, unless the Court shall, in its discretion, order it to be preserved. A lien which has already been foreclosed and become *functus officio* is not to be regarded, although created within that time. Where, before the adjudication, the property levied upon has been sold and converted into money, which is in the hands of the Sheriff, the state of affairs contemplated by subdivision *f* no longer exists. There is no property affected by the "levy" or other lien. The property which *was* affected has passed to the purchaser; the lien has become extinguished; the money in the hands of the Sheriff, although the

particular coins or bills are legally the latter's money, is practically the property of the creditor, and therefore cannot be affected by the adjudication, because subdivision *f* contemplates property of the *debtor*.

Section 67 throughout all its subdivisions deals with the subject of liens only, and subdivisions *e* and *f*, are devoted to the consideration of judicial liens. Such liens are of three kinds: Those which are originated by the commencement of a suit, as an equitable lien created by the filing of a creditor's bill; those which arise during its progress as an attachment; and those which are created after its termination, as a judgment lien on real estate or an execution lien. These three classes of liens are doubtless comprised in the language of subdivision *e*, namely, "a lien created *by*, or obtained *in*, or *pursuant to*, any suit or proceeding at law or in equity." The same idea is expressed in the enumeration in subdivision *f* of "levies, judgments, attachments or other liens, obtained through legal proceedings." It mentions such liens in the inverse order in which they may be created. It speaks first of "levies," meaning the lien created by the levy of an execution or other final process; next, of "judgments," which naturally must precede such levy; next, "attachments," which must naturally precede judgments; and lastly, "other liens," which doubtless refers to liens created by the commencement of a suit in equity.

Subdivision *f* does not mention executions, although these are the most important and numerous of all writs, and the ones which would most readily occur to the mind of the Legislature in this connection. The enforcement of a writ of execution embraces five steps: (1) the issuance of the writ and its delivery to the Sheriff; (2) the levy by the officer; (3) the conversion of the prop-

erty levied on into money by a sale; (4) the payment to the plaintiff; and (5) the return. By failing to mention "executions" and specifically mentioning "levies" Congress evidently intended to constitute that stage of the progress of the execution, as the specific and ultimate point at which the adjudication of bankruptcy should arrest the enforcement of the execution. It is the levy which perfects the lien of the execution, and retains such lien until a sale for the purpose of allowing the title of the purchaser to relate back to it.

In Bond v. Willet, 1 Keyes, 377, 386, the New York Court of Appeals say: "A levy upon per-"sonal property is the act of taking possession of, "attaching or seizing it, by the sheriff or other "officer, under and by virtue of any execution he "may hold against such property, whereby the lien "of such execution upon such property becomes "perfect, and the property is thereupon deemed to "be in the custody of the law." After sale, it is released from the custody of the law. The intention of Congress therefore evidently must have been that after the stage of the levy had been passed, and a sale had occurred, the subsequent adjudication of bankruptcy should not affect the further operation of the execution.

Congress, therefore, in this enumeration, having had in view a *levy* as the ultimate lien which should be affected by an adjudication, if before that time, the levy has performed its office and ceased to exist, the Court by construing the lien to extend to the stages of sale and receipt of the money by the sheriff would be encroaching upon the domain of the Legislature.

The question then for solution in this case is simply this: Can the money made by the Sheriff by a sale under the execution before the filing of

the petition, be regarded as property of the judgment debtor "affected by the levy" within the language of subdivision *f*?

We assert the negative to that question.

(b.) The sheriff after an execution sale becomes a debtor to the creditor.

While the personal property continues to rest under the levy, the judgment debtor remains the owner thereof, and he can convey title subject to the lien of the execution. Mumper v. Rushmore, 79 N. Y., 49; Ansonia B. & C. Co. v. Connor, 103 N. Y., 502, 511-512. After the sale of the property the money realized belongs in effect to the judgment creditor, as we shall endeavor to show.

It is doubtless the law, as stated by the District Judge (Rec., p. 68), that the specific coins or bills which have been realized by the Sheriff on an execution sale, are not the chattels of the execution creditor, and for that reason cannot be levied upon specifically as his property. The Sheriff, however, by virtue of his proceedings, becomes a debtor to the execution creditor. This was decided in Turner v. Fendall, 1 Cranch, 117. Chief Justice Marshall there says: "Has money, not yet paid to the "creditor, become his property? That is, *although "his title to the sum levied may be complete*, has he "the actual legal ownership of the specific pieces "of coin which the officer may have received? On "principle the Court conceives that he has not this "ownership. The judgment to be satisfied is for "a certain sum, not for the specific pieces which "constitute that sum, *and the claim of the creditor "on the sheriff seems to be of the same nature with "his claim under the judgment, and one which may "be satisfied in the same manner.* No right would "exist to pursue the specific pieces received by the "officer, although they should even have an ear-

"mark; *and an action of debt, not of detinue, may "be brought against him if he fails to pay over the "sum received* or converts it to his own use. It "seems to the Court that a right to specific pieces "of money can only be acquired by obtaining the "legal or actual possession of them, and until this "is done there can be no such absolute ownership "as that an execution can be levied on them. A "*right to a sum of money in the hands of a Sheriff "can no more be seized than a right to a sum of "money in the hands of another person*, and how-"ever wise or just it may be to give such a remedy, "the law does not appear yet to have given it."

In the case quoted from, the plaintiff in execution had sued the Sheriff for failing to turn over the money collected on his execution, and the Sheriff sought to defend on the ground that he had in his hands an execution in favor of a judgment creditor of the plaintiff. The Court held that that was no defense to the action, and that the only way in which the officer could have protected himself was by paying the money into court in obedience to the mandate of his writ, in which event the Court could have ordered the money to be paid to the second creditor, and such order would have been a defense to the Sheriff.

The specific money collected by the Sheriff belongs to him in his official capacity, and if it is lost before payment to the judgment creditor, the loss falls on the officer. For example, if he deposits it in a bank which fails. Phillips v. Lamar, 27 Ga., 228; Shaw v. Bauman, 34 Ohio St., 32.

The rule is the same if it be stolen from him. Gilmore v. Moore, 30 Ga., 628; United States v. Dashiell, 4 Wall, 182 (case of U. S. Paymaster).

(c.) The execution sale satisfies the debt.

Section 1369 of the Code of Civil Procedure of

the State of New York, speaking of an execution, reads as follows:

"It must, except in a case where special provis-"ion is otherwise made by law, substantially re-"quire the Sheriff to *satisfy* the judgment, out of "the personal property of the judgment debtor; "and, if sufficient personal property cannot be "found, out of the real property, belonging to him "at the time when the judgment was docketed in "the clerk's office of the county, or at any time "thereafter."

The question which arises under this Section of the Code is, when is such a judgment *satisfied?* The mere levy is not a satisfaction. The satisfaction is complete when the title to the goods levied on is changed by the act of the Sheriff. U. S. v. Dashiell. 3 Wall., 688.

The Court there say: "When the property is lost "to the debtor in consequence of the legal measures "which the creditor has pursued, '*the debt*,' says "Bronson, Ch. J., '*is gone although the creditor "may not have been paid.*' Under these circum-"stances the creditor must take his remedy against "the officer, and if there be no such remedy he must "bear the loss. Taylor v. Hill, 4 Hill, 621."

It necessarily follows that when a Sheriff has sold the goods levied on, and received the purchase money therefor, the judgment is satisfied and the debt is gone although the money has not yet been paid to the creditor. If the debt is paid by the receipt of the money by the Sheriff, the money while in his hands, is certainly not the property of the judgment debtor, and is therefore not affected by any lien, as contemplated by Section 67, *f*, but it is the property of the creditor as the Sheriff becomes his debtor for the same

That it is the receipt of the money by the Sheriff, and not by the creditor, which satisfies the judgment and pays the debt, is shown by the N. Y. Code of Civ. Pro., Sec. 1266, which provides, that "a Sheriff upon being paid the full amount due "upon an execution in his hands, must *immediate-"ly* endorse thereupon a *satisfaction* thereof."

In the State of New York it is well settled that a Sheriff collecting money under an execution, becomes a debtor to the creditor for the amount collected, and thereby the latter acquires a cause of action against him for money had and received without demand.

Brewster v. Van Ness, 18 Johns, 133; Dygert v. Crane, 1 Wend., 534; People v. Dunning, 1 Wend., 16; Walden v. Davidson, 15 Wend., 575; Denton v. Livingston, 9 Johns, 96; Armstrong v. Garrow, 6 Cow., 465; Townsend v. Olin, 5 Wend., 607.

The creditor recovers in such an action not only the amount collected by the Sheriff, but interest thereon as on any other debt.

Slingerland v. Swart, 13 Johns., 225.
Crane v. Dygert, 4 Wend., 675.

The Sheriff, therefore, is in the same position as a bank to whom a depositor has paid money. The depositor loses his title to the specific moneys which he deposits in the bank, even if they can be identified, and they could not be levied on under an execution against him even if the bank were to pick them out and set them aside for the purpose of such levy. Carrol v. Cone, 40 Barb. (N. Y.), 220; but he has a cause of action against the bank for the amount of his deposit, and his *claim* against the bank could be attached as a chose in action.

It has been held that the claim of a judgment creditor against a Sheriff for money collected by

the latter under the former's execution, can be attached as the creditor's chose in action. Wehle v. Connor, 83 N. Y., 231.

(d.) The Sheriff is the agent of the creditor.

The Sheriff in collecting the money has acted as the agent of the execution creditor. The money when paid to or collected by him is regarded as money paid to or collected by the execution creditor, and if the Sheriff fails to pay it over, the creditor can sue him just as any principal can sue a defaulting agent as for money had and received when he fails to pay over money collected by him.

In Nelson v. Kerr, 59 N. Y., 224, the Court say: "The Sheriff in collecting an execution acts as the "officer of the Court whose process it is, and also "as *agent*, appointed by law, of the party who seeks "by aid of the writ to obtain satisfaction of the "debt or thing awarded by the judgment. *The "money collected by the Sheriff belongs to the "plaintiff. The Sheriff, when he receives it, takes "it as the agent of the party who has the judgment, "and it is money had and received by him to the "plaintiff's use.*"

So clearly is the money collected by the Sheriff on execution the property of the execution creditor, that if the Sheriff has by mistake paid the money over to a third party, the execution creditor and not the Sheriff, can sue the latter for the money as his own.

Kingston v. Eltinge, 40 N. Y., 391.
Haebler v. Myers, 132 N. Y., 363, 369.

In the Kingston Bank case, *supra*, the Court say at page 395: "*The money thus received by the "defendant was the plaintiff's money. That it "did not belong to the defendant follows neces-*

"*sarily.*" The "plaintiff" here referred to, was a creditor holding a senior execution, and the "defendant" was a creditor holding a junior execution, the Sheriff having by mistake paid the money made by him under the first execution to the party holding the second execution.

(e) *The creditor may sue for the money as soon as it is made, even before the return day.*

The learned District Judge in his opinion herein admitted the correctness of the foregoing principles, but denied their application to the case at bar because the return day of the execution was subsequent to the filing of the petition in bankruptcy. Thus he says, at page 68 of the record: "There is no doubt that by the law of this State, "moneys collected by a sheriff through a sale on "execution, are in a certain sense the property of "the plaintiff, provided the proceedings are valid "(Nelson v. Kerr, 59 N. Y., 224; Kingston Bank "v. Gelting, 40 N. Y., 391, 395; Wehle v. Connor, "82 N. Y., 231), but not completely so, nor subject to levy against him until paid over (Baker v. "Kenworthy, 41 N. Y., 215; Turner v. Fendall, "1 Cranch, 134). But the execution creditor is "not entitled to the specific moneys, nor can he "maintain any action against the sheriff for not "paying them over, until either the return day of "the writ of execution has passed, or the sheriff "has made return of the writ. Not until then can "the creditor have either possession, or the right "of possession. The sheriff is not the mere agent "of the creditor, but an officer of the law as well, "who may pay the money into Court along with "the return of the writ (Nelson v. Kerr, *supra.* Turner v. Fendall, 1 Cranch, 134-137.)"

We do not think that the rule laid down by Judge Brown applies to a case where the Sheriff has made the money before the return day.

Rogers v. Sumner, 16 Pick., 387.
Morland v. Pellatt, 8 B. & C., 722, 727.
Higgins v. McAdam, 3 Y. & J., 1, 13.

If it does, it is of no importance because the fact that the creditor cannot sue until the return day, in no way impairs his right against the sheriff as his debtor. His rights are not different from those of the holder of a promissiory note or other debt before maturity.

(*f*) *If the return day occur before the adjudication it is sufficient, even though after the filing of the petition in bankruptcy.*

The fallacy of Judge Brown's position, however, is in assuming that the accruing of the creditor's right of action consequent upon the expiration of the return day, must occur before the filing of the petition in bankruptcy. The date of the adjudication, is the time fixed by the present act for the vesting of title in the trustee. Under the Act of 1867 the title to the bankrupt's property vested in the assignee by the assignment to him, but related back to the commencement of the proceedings in bankruptcy. Act of 1867, Sec. 14. Under the present act the title vests in the trustee upon his appointment and qualification, and relates back to the date of the adjudication of bankruptcy and no further. Act of 1898, Sec. 70-a, which is as follows: "The trustee of the estate of a bankrupt, "upon his appointment and qualification, and his "successor or successors, if he shall have one or "more, upon his or their appointment or qualifica- "tion shall in turn be vested by operation of law "with the title of the bankrupt, *as of the date he "was adjudged a bankrupt except*," etc.

The creditor's title, therefore, depends on priority, only to the adjudication.

(*g*) *Such was the fact in the case at bar.*

The execution of Clarke was dated March 6th, 1899, and was returnable sixty days from its date, viz., May 6th, 1899 (Rec. 25). The date of the filing of the petition in bankruptcy was April 13th, 1899 (Rec. 9), and the date of the adjudication was June 15th, 1899 (Rec. 9). The execution creditor, Clarke, therefore, became entitled to a right of action against the sheriff for the money in his hands at least a month and nine days before the date of the adjudication in bankruptcy.

(*h*) *The Act of 1841 vested title as of the date of the adjudication.*

The Act of 1898 in this respect resembles the Bankrupt Act of 1841. Section 3 of that act provided that the property of the bankrupt should "by mere operation of law, *ipso facto, from the "time of such decree*, be deemed to be divested "out of such bankrupt, without any other act, as- "signment or other conveyance whatsoever; and "the same shall be vested, by force of the same "decree, in such assignee as from time to time "shall be appointed by the proper Court for this "purpose."

Under that act it was held that any transfers of the bankrupt's property, or any rights or liens obtained thereon between the time of filing the petition and the decree of bankruptcy were valid and binding on the assignee.

Ex parte Bennett, 1 Penn. L. J., 145; 3 Fed. Cases, 203.

Dudley's Case, 1 Penn. L. J., 302; 7 Fed. Cases, 1150.

Miller v. Black, 1 Barr., 420.

Smith v. , 4 Edw. Ch. (N. Y.), 653.

Berthelon v. Betts, 4 Hill (N. Y.) 577.

In Buckingham v. McLean, 13 How., 151, 169, Mr. Justice Curtis said, that under the Act of 1841 the creditor could "enter up a judgment and issue "execution, and by levy acquire a valid lien, down "to the very moment when the title of the assignee "began."

A different result was arrived at under the Act of 1867, but the reason was that by the provisions of Section 14 of that Act the title of the assignee expressly related back from the time of the assignment, to the commencement of the proceedings in bankruptcy.

(*i*) *The present law, in this respect, is like the Act of 1841.*

In Bush on Bankruptcy, 385, that author quotes from a report of the House Committee of Congress on the Judiciary to Congress on the present act as follows: "Under Sec. 70, an important change "has been made from the former laws, as well as "from proposed legislation. Under the Act of 1867, "as interpreted by the Courts, it was held that "the title of the bankrupt's property vested in the "assignee as of the date of the filing of the pe- "tition in bankruptcy. This bill provides that "the trustee shall 'be vested by operation of "'law with the title of the bankrupt as of the date "'he was adjudged a bankrupt.' By this change "the alleged bankrupt can sell and convey a per- "fect title up to the date of the adjudication, and "the purchaser does not buy at his own risk and "in danger of having secured an imperfect title by "reason of an adjudication which may be subject "(subsequent) to the purchase. It does not follow "that because a petition is filed against a person "in the bankruptcy Court he will be adjudged a "bankrupt, and it seems but proper that the pub- "lic in dealing with him until he is adjudged a "bankrupt should deal without fear of loss or "danger as to title."

These considerations, which prompted Congress to make the date of the adjudication, that of the acquisition of title by the trustee, influenced it also to make that date the one on which the judicial liens mentioned in Sect. 67, Subdivisions *c* and *f*, should be dissolved or become null and void.

Therefore, even under the reasoning of Judge Brown above quoted, the execution creditor, Clarke, acquired immediately after the return day of the execution, a perfect right of action against the Sheriff for the money in his hands, which was not affected by the previous filing of the petition, and certainly could not be, by the adjudication which occurred over a month afterwards, and if the Sheriff had not been restrained by the injunction issued by the learned Judge, he would have been perfectly justified in paying over that money upon the return day to the execution creditor, Clarke, or into Court for his benefit in obedience to the mandate of the writ of execution, notwithstanding the previous filing of the petition in bankruptcy.

(*j*) *Before sale, the execution creditor has no property rights.*

The property right of an execution creditor in the proceeds of his execution arises only *after* sale has been made and the money collected by the sheriff. *Before* that time he has no right of property whatever in the goods levied upon. In the case of an injury to those goods by a wrongdoer or loss of their possession by the sheriff, the latter or the judgment debtor can sue, but not the creditor. The latter can sue in a certain case provided for by statute in New York, *but not at common law.*

Scott v. Morgan, 94 N. Y., 508, 515.

We have shown above that *after* the money has been received by the sheriff, the right of action against a third person wrongfully receiving it from the sheriff is in the plaintiff in execution.

Kingston Bank v. Eltinge, *supra*.
Hoebler v. Meyers, *supra*.

(*k*) *In case of loss of the property levied on, however, it falls on the creditor, not on the debtor.*

It follows from the identification of the execution creditor with the sheriff as principal and agent by operation of law that if the property levied on is injured, lost or destroyed, by act of the latter, the loss as between the creditor and the debtor, falls on the former and not on the latter. The execution is, in that event, deemed satisfied to the extent of the property levied on, and the claim of the creditor to recover his debt, thereafter exists against the sheriff and not against the execution debtor.

Peck v. Tiffany, 2 N. Y., 451.
U. S. v. Dashiell, 3 Wall., 688.

Where a sheriff misappropriates money collected by him on an attachment, the plaintiff must bear the loss. Matter of Dawson, 110 N. Y., 114. Judge Earl says in that case at page 117: "The "question now to be determined is, who is to bear "the loss of the sheriff's misconduct and default, "the plaintiffs or the defendant? We think the "loss should fall upon the plaintiffs. If this "money had been seized by virtue of an execu- "tion and the defendant had been deprived there- "of, it is well settled that the loss would fall upon "the plaintiffs, and that to the extent of the prop- "erty thus taken the judgment and execution "would be satisfied. (People v. Hopson, 1 Denio. "574; Peck v. Tiffany, 2 N. Y., 451)."

And again on page 118:

"If this money had been seized by virtue of an ex-
"ecution, *it would at once have operated as a pay-*
"*ment pro tanto upon the execution.* Here, in theory
"of law, the money is in the possession of the sher-
"iff, and when execution was issued to him it was
"at once applicable thereon and *must be deemed*
"*to have been so applied.* If the sheriff had been
"found within his county, and the execution had
"actually been delivered to him, he could not have
"returned the same unsatisfied but could have been
"compelled to return the same satisfied, as to the
"amount of money received by him upon the attach-
"ment. (Code, Sec. 708.) And such a return would
"have been conclusive in favor of the defendant,
"*and would have left the plaintiffs with their*
"*remedy against the Sheriff for money received*
"*by him.*"

(*l*) *Collection by the Sheriff is payment to the execution creditor.*

In other words, the sheriff being the agent of the execution-creditor, a payment to the former is in law a payment to the latter. All that remains to be done after such payment is for the sheriff to turn the money collected by him over to the execution creditor, and with the transaction between the sheriff and the execution creditor the execution debtor has nothing to do. After the money collected under the execution has come into the hands of the sheriff the execution debtor's debt is paid just as though he had himself paid it over to an agent or attorney of the creditor. The consequence is that when this money has been received by the sheriff it is no longer the property of the debtor; there is no lien upon it for anybody. It is the property of the creditor whose only claim thereafter is against the sheriff as his collecting agent.

Such being the status of the fund, Section 67 of the Bankrupt Law does not apply to it. It is no more to be regarded as "property of the debtor affected by a lien" while in the hands of the sheriff than if it were in the hands of the execution creditor's attorney or other agent.

Hoover v. Wise, 91 U. S., 308.

This exact point has been decided under the present law *in re* Easley, 93 Fed. Rep., 419, in the Western District of Virginia. The Court there held that where a judgment has been recovered in a state Court, execution issued and levied upon personal property and sale thereunder made by the sheriff before the commencement of proceedings in bankruptcy against the debtor, the proceeds of sale remaining in the hands of the sheriff are beyond the jurisdiction of the Court of bankruptcy and he will not be enjoined from paying the same to the execution creditor.

The case *in re* Franks, 95 Fed. Rep., 635, cited by Judge Brown in his opinion (Rec., 68), to show that the proceeds of the sale take the place of the property levied on, is not in point, because that was the case of an attachment which differs from an execution in this respect. The case of *in re* Fellerath, 95 Fed. Rep., 121, also cited by the learned Judge (Rec., 68), is so imperfectly reported, the date of the execution sales and of the proceedings in bankruptcy not being given, that the point decided by it is indeterminate.

(*m*) *Sec. 70, subdivision a, clause 5 of the Bankrupt Law conclusively supports our contention.*

This clause provides that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt to all "property

"which prior to the filing of the petition he could "by any means have transferred, or which might "have been levied upon and sold under judicial "process against him." That applies, clearly, to property of the bankrupt which at the date of the filing of the petition is in the custody of the Sheriff under the levy of an execution. Such property comes directly within that description and it passes to the trustee under the operation of Sec. 67, Subdivisions *c* and *f*, freed from the lien of the levy. The description mentioned, however, does not apply to a sum of money in the hands of the Sheriff made by him under an execution prior to the filing of the petition. That money could not by any means be transferred by the bankrupt, neither could it be levied on or sold under judicial process against him at the time of filing the petition, for the simple reason, as above shown, that the right to recover it from the Sheriff is in the creditor and not in the debtor. The trustee, therefore, can in no event take any title to it, and it is therefore exempt from the operation of the bankrupt law.

II.

The English Bankruptcy Act of 1825 has received the same construction.

The point which we urge has arisen with regard to the bankruptcy act 6 Geo., 4, c. 16, s. 108, a section which an English Judge said had occasioned more litigation within a few years than any other act of Parliament.

Gordon v. Sanctuary, 4 B. and Ad., 255, 266.

It was as follows: "*No creditor having security* "*for his debt*, or having made any attachment in

"London or any other place by virtue of any "custom there used, of the goods and chattels of the "bankrupt, *shall receive upon any such security* "or attachment *more than a ratable part of such* "*debt;* except in respect of any execution or extent "served and levied by seizure upon, or any mort- "gage of or lien upon any part of the property of "such bankrupt before the bankruptcy; provided "that no creditor, though for a valuable consider- "ation, who shall sue out execution upon any judg- "ment obtained by *default, confession or nil dicit,* "*shall avail himself of such execution* to the pre- "judice of other fair creditors, but shall be paid "ratably with such creditors."

Under this section numerous questions arose with regard to the rights of execution creditors obtaining judgments "by default or confession" under warrants of attorney and therefore coming within the proviso to the section. In Wymer v. Kemble, 6 B. and C., 479 (decided in 1827), a creditor having a warrant of attorney, entered up judgment thereon by *non sum informatus* or "default," and an execution was issued and levied on goods of the debtor, and these were sold by the Sheriff to the judgment creditor. About three weeks *after the sale* the debtor committed an act of bankruptcy by declaring himself a bankrupt, and was duly adjudicated such, and assignees were appointed. These took the goods from the execution creditor, claiming that under the proviso to the above section he could not "avail himself of his execution" by reason of the judgment being by default. The execution creditor sued the assignees in trover, and was held entitled to recover. Lord Tenterden said (page 483): "The seizure and "sale were perfect and complete before the act of "bankruptcy; the plaintiff therefore, by the

"general rules and principles of law, is entitled to "maintain this action, unless there be some legis- "lative enactment to prevent. It is said that the "6 G., 4, c. 16, s. 108, is such an enactment. "The statute is certainly obscure, but I think "that a reasonable construction has been given to "it by the plaintiff's counsel; It seems to me that "the plaintiff is not within the class of persons "therein mentioned. *He was not at the time of "the bankruptcy* 'a creditor having security' for he "had been paid by means of the execution before "the bankruptcy occurred. The section in ques- "tion first provides that 'no creditor having security " 'for his debt, etc., shall receive upon any such " 'security more than a ratable part of such debt;' "then follows an exception of certain cases 'except " 'in respect of an execution or extent served and " 'levied by seizure upon or mortgage of, or lien " 'upon, any part of the property of the bankrupt " 'before the bankruptcy.' That applies to "creditors having security, for a person who has "levied by seizure is such a creditor; he has a "security by his right to have the goods sold. "Then comes the proviso that 'no creditor, though " 'for a valuable consideration, who shall sue out " 'execution upon any judgment obtained by de- " 'fault, confession or *nil dicit*, shall avail himself " 'of such execution to the prejudice of other fair " 'creditors, but shall be paid ratably with such " 'creditors.' Now that only limits the exception, "and the exception applies only to cases falling "within the first part of the section, viz., those of "creditors having security. The present plaintiff "*was not at the time of the bankruptcy a creditor* "*at all*, and therefore, cannot be within the oper- "ation of the statute."

It will be noticed that the section did not say "having security *at the time of the bankruptcy;*"

but the Court construed it to have reference to that date, although no time at all was mentioned.

That the execution creditor's right to the money made by the Sheriff under the execution, attaches immediately upon its receipt by the latter, and cannot be affected by the fact that the assignee in bankruptcy becomes invested with title to the debtor's property between the time of the receipt of the money by the Sheriff and his payment thereof to the creditor, was decided under the same section, in Morland v. Pellat, 8 B. & C., 722 (A. D., 1828). In that case judgment was entered upon a warrant of attorney, and a *fi fa* issued, returnable May 2d. On May 1st the debtors paid to the Sheriff the money to be levied. On May 5th they committed an act of bankruptcy and on May 11th a commission issued. On May 19 the Sheriff paid the money to the execution creditor. The latter was sued by the assignees for the money. It was held that he was entitled to retain it, not being a creditor having security *at the time of the bankruptcy.*

BAYLEY, J., said (p. 725): "The plaintiff's title "was not complete until the 5th of May, and "before that time the writ issued by Pellatt was "returnable, and the Sheriff had received under it "the whole sum necessary to satisfy the debt. It "is said that the Sheriff was bound to keep the "money until the return of the writ. We need "not decide that, for here it was the duty of the "Sheriff to bring the money into Court on the 2d "of May, to be paid to the execution creditor. "He did not do so; but his neglect of duty cannot "vary the rights of the parties, and if he had "done his duty Pellatt would clearly on that day "have ceased to be a creditor of the bankrupts. "But without any actual payment of the money to "the creditor, I think that the seizure of the

"debtor's goods, and the conversion of them into "money, extinguishes the debt. * * * After "seizure and before sale, the Sheriff has a special "property in the goods, but the debtor has the "general property; up to that time, therefore, the "debt is not extinguished, and the judgment "creditor has a security for his debt. But after "sale, or payment of the money, the Sheriff be- "comes the debtor, and the original debt is ex- "tinguished. In this case, therefore, I am of the "opinion that the defendant was not a creditor at "the time of the bankruptcy, and consequently "was not within the statute. He has then a right "to retain the money paid to him by the Sheriff."

LITTLEDALE, J., said (p. 726): "A creditor may "be considered as having security by a judgment "or a seizure under *fi fa*. But had he security in "this case? The act of bankruptcy by one of the "partners was not until the 5th of May. The "whole of the money was paid to the Sheriff's "officer on the 1st day of May, before an act of "bankruptcy by either partner, and on the 2d it "was the duty of the Sheriff to return the writ and "pay over the money. From that time Pellatt "ceased to be a creditor having security. *But I "am disposed to go still further, and to say that "the Sheriff was liable to an action for money had "and received at the suit of the creditor as soon "as it was paid, and before the return of the writ*" (p. 727).

PARKE, J., said (p. 727): "It appears to us that "Pellatt was not a creditor of the bankrupts at the "time of their bankruptcy for, according to the "case of Peckinson v. Gilford (Cro. Car., 539), at "all events on the 2d of May the Sheriff was sub- "stituted for them as the debtor, although it may "be doubtful whether an action would lie against "him before the return day of the writ. Here,

"however, the title of Pellatt was perfect before "that of the present plaintiff's arose. In Clerk v. "Withers, as reported by Lord Raymond (1072), "Lord Holt says, that the levy is an answer to an "action of debt or *scire facias* on the judgment, "and he refers to Atkinson v. Atkinson, Cro. "Eliz., 390; but there the money had been paid to "the Sheriff. That point, therefore, may be some- "what doubtful, *but where the money has been "paid to the Sheriff there can be no doubt.* Pel- "latt, therefore, at the time of the bankruptcy, "was no longer a creditor of the bankrupt. Then "is he seeking *to avail himself of the execution?* "It is said that he is, because he cannot sue the "Sheriff without proving it. Supposing that it be "so, he is using it against the Sheriff, *and not "to the prejudice of other fair creditors of the "bankrupt.* Such an use of the execution is not "prohibited." It will be noticed that the Judge was speaking of the state of affairs at the date of the commencement of the bankruptcy proceedings

Section 81 of the same Act provided, "That all "executions against the goods and chattels of such "bankrupt, *bona fide* executed or levied more than "two calendar months before the issuing of such "commission shall be valid, notwithstanding any " prior act of bankruptcy by him committed."

It was held in Godson v. Sanctuary, 4 B. & Ad., 255 (1832), that by virtue of Section 81, an execution levied prior to the two months upon a judgment taken by confession upon a warrant of attorney or otherwise, was not affected by Section 108, and that that section applied only to executions levied upon warrants of attorney within the two months prior to the commission, and affected such executions only when there had not been a sale prior to the issuing of the commission in bankruptcy; one of the Judges saying: "That

when the judgment is by default or confession, then, to entitle the creditor to a preference *'there must have been a sale* as well as a seizure' " (*id.*, 264). During the existence of Sections 81 and 108 above mentioned, the case of Higgins v. McAdam, 3 Y. & J., 1, was decided in 1829. The Court there held that Section 108 only applied to executions on judgments by default levied within two months prior to the bankuptcy, yet that a creditor having such an execution should not be forbidden to avail himself of his execution if he had passed out of the stage of a creditor having security for his debt before the issuing of the commission in bankruptcy through the medium of a sale under his execution. He would only lose the benefit of his execution if he was such creditor having security at the time of the commission.

The statute 2 & 3 Vict., c. 29, was substantially the same as 6 G., 4, c. 16, s. 81, above quoted, except that it dispensed with the two months prior limitation and validated *bona fide* transactions and executions executed before the *fiat* in bankruptcy. In Whitmore v. Robertson, 8 M. & W., 463 (1841), it was held that under the 2 & 3 Vict., c. 29, an execution issued on a judgment entered on a warrant of attorney and executed by seizure before the *fiat*, but not completed by sale until after that event, was still affected by Section 108 of 6 G., 4, c. 16, and that the levy was avoided by the *fiat*. Parke B., there says of the latter section: "The "costruction put upon that section by several cases "having been, that if the plaintiff was a creditor "of the bankrupt at the time of the act of bank- "ruptcy, he had no priority, *and he was such "creditor of the bankrupt, until, by the actual sale "of the goods, the Sheriff became liable to him for "the proceeds of the sale.*"

This case was followed in Skey v. Carter, 11 M. & W., 571 (1843), and Tindal C. J., there repeats the statement that where a sale under the execution has taken place before the *fiat*, the execution is not invalidated by the *fiat* because the execution creditor has in consequence of the sale ceased to be "a creditor having security for his debt" (*id.*, 574, 575).

In Whitmore v. Greene, 13 M. & W., 104 (1844), it was held that where the seizure and sale under the execution both took place before the *fiat*, the creditor was entitled to the benefit of his execution notwithstanding he had notice of a prior act of bankruptcy, and that Section 108, 6 G., 4, c. 16, did not apply. Pollock, C. B., says at page 112: "If the fiat intervenes before a sale, the execution "plaintiff is not entitled, because he was still a "creditor of the bankrupt at the time of the *fiat* " * * * * and consequently is within the pro- "viso of the 108th Section, and is only to be "relieved ratably. If the *fiat* is after the sale, the "execution plaintiff is not a *creditor* of the bank- "rupt at the time of the bankruptcy, that is, the "*fiat*, and is entitled to the preference which his "execution gives him."

In Buckingham v. McLean, 13 How., 150, which was decided under the Bankrupt Act of 1841, then repealed, Mr. Justice Curtis says that the object of Section 108 was to prevent a creditor from taking a judgment by confession before the proceedings in bankruptcy. Thus he says at page 169, speaking of our Act of 1841: "It is true, this "construction would put it in the power of "creditors, by taking a bond or warrant of attorney, "while the debtor was solvent and did not contem- "plate bankruptcy, to enter up a judgment and "issue execution, and by a levy acquire a valid

"lien, down to the very moment when the title of "the assignee began. But this was undoubtedly so "under the statute of James, which, like ours, "contained no provision to meet this mischief; and "it became so great that, by the 108th Section of "the revising Act of 6 Geo., IV., it was enacted, "that 'no creditor, though for a valuable consider- " 'ation, who shall sue out execution on any judg- " 'ment obtained by default, confession or *nil dicit*, " 'shall avail himself of such execution, to the pre- " 'judice of other fair creditors, but shall be paid " 'ratably with such creditors.' If the Bankrupt "Act of 1841 had continued to exist, a similar ad- "dition to its provisions would doubtless have "become necessary."

Notwithstanding, as Mr. Justice Curtis correctly observes, that the purpose of Section 108 was to prevent creditors from availing themselves of the levies of executions which they had obtained before and down to the commencement of the bankruptcy proceedings, the construction of all the English Courts, as we have shown, was that it only forbade them from availing themselves of levies which existed as liens at that time and did not apply to liens previously merged into a sale.

The application of these cases to the one at bar we understand, is to be this: Section 108 above quoted, had provided that a creditor having security which consisted of the levy of an execution founded on a judgment by confession, *e. g.*, one obtained under a warrant of attorney, would lose the benefit thereof by the issuance of a *fiat* in bankruptcy against his judgment-debtor, and he could only come in ratably with other creditors. Sec. 81 practically avoided levies made within two months prior to the commencement of bankruptcy proceedings. The Courts, however, made this distinction, that if the execution had proceeded

simply to the stage of a levy and no further, at the time of the bankruptcy, it was avoided by the *fiat*, because the plaintiff in execution was "a creditor having security for his debt," but that if the execution had proceeded to the stage of a sale of the goods, even though the Sheriff still held the proceeds of the same, he was no longer a creditor, and would therefore not lose the preference which he had obtained by his execution. In other words, the question was not whether he *once had been* a creditor having an execution within the inhibited time before the *fiat*, but whether he was such at the time of the *fiat*. This is what we claim in the case at bar, that the question is not whether within the four months prior to the filing of the petition there has been "property of the debtor affected by the levy or other lien," but whether that is the case at the time of the adjudication, or at least at the time of the filing of the petition. If at that time the goods levied on have already been sold, and the proceeds are in the hands of the Sheriff, the plaintiff in execution is no longer a creditor, the defendant in execution is no longer a debtor, and the proceeds in the Sheriff's hands are not "property affected by a levy or other lien," but belong to the judgment creditor as his own property, and consequently the Bankrupt Act does not apply to that state of affairs.

III.

The words "null and void" in Section 67, subdivision f, relate to the time of the adjudication in bankruptcy, and are to be construed as having a present and not a retroactive operation.

The theory upon which the learned U. S. Circuit Court of Appeals decided this case was different

from that of the District Judge, and was in effect that the adjudication of Kenney as a bankrupt related back to the levy upon his property, although it had in the meantime been consummated by the sale, and rendered it (the levy) null and void, and that therefore the sale and collection of the proceeds thereof rested upon null and void proceedings, and the money took the place of the property sold, and was still the property of the bankrupt and passed to his trustee (Rec. 73-74).

The fallacy involved in this position is that in endeavoring to supply certain words omitted in Sec. 67, subdivision "f," it inserts the wrong ones.

Between the words "shall be deemed" and "null and void" certain words should be inserted to supply the context. Mr. Justice Lacombe construes the phrase as though it should read "shall be deemed *to have been* null and void." We believe that it should read "shall be deemed *to be* null and void." The same construction should clearly be given to the words in the same paragraph "shall be deemed wholly discharged and released from the same."

(*a*) *The retroactive construction makes an innocent sheriff a trespasser by his levy, through the the doctrine of relation.*

Under the construction of the learned Court below, a Sheriff who in good faith and in obedience to the command of the Court, has levied his execution upon the property of the debtor, and sold the same, and paid the money collected by him over to the creditor, can be compelled in case the debtor is thrown into bankruptcy within four months thereafter, to pay the money made by him to the trustee in bankruptcy, or to pay the value of the property, because his proceedings, though valid at the time, have by relation back of the ad-

judication become null and void. Such a rule carried to its legitimate conclusion would stop the enforcement of judgments for the collection of money in every Court throughout the United States, for no sensible Sheriff could be expected to undergo such a risk.

That we have not misquoted Mr. Justice Lacombe will be shown by reference to his opinion. Thus he says at page 73 of the Record: "How has this amount "(812,000) disappeared? Because Clark obtained "a judgment against the bankrupt and the Sheriff "under such judgment made a levy, which removed "the goods from the bankrupt's estate, and turned "them, through sale, into money. But under the "provisions of the bankrupt act the judgment and "the levy are to be held null and void. As a con- "sequence *the goods have been forcibly removed "without right from the bankrupt's possession "by Clark and the Sheriff.*" This must mean that the Court holds Clarke and the Sheriff to be trespassers *ab initio.* And again at page 74, "It "makes no difference whether the creditor and "Sheriff whose only title rests on 'null and void' "proceedings, hold the goods themselves or the "money which represents them, nor whether as "soon as the Sheriff sells under execution, it is his "duty to turn over the proceeds to the judgment "creditor, nor whether under the law of New York "the Sheriff holds the proceeds as the agent of the "creditor, nor that ordinarily such proceeds would "be the property of the judgment creditor. They "cannot be his property in this case *because the "only proceedings through which he can make out "title to retain their possession are such as the "bankruptcy Courts must hold to be null and "void.*"

The consequence of this rule, if it be correct, must be, that a Sheriff who levies an execution upon

the property of a debtor in obedience to the mandate of his writ, and sells the same and pays the money over to the creditor in good faith and without notice, becomes a trespasser, *ab initio*, and liable, as for a conversion, to the trustee in bankruptcy of the debtor if a petition in bankruptcy be filed against the latter within four months thereafter and be followed by an adjudication.

(*b*) *The doctrine of relation is not favored in its application to bankruptcy law.*

The words "shall be deemed null and void" contained in subdivision "f," refer apparently to liens existing at the date of the adjudication, and can only be construed to annul levies and other liens as of the date when they were first obtained, so as to override all intermediate acts completing their enforcement, by virtue of the doctrine of relation. It is well settled that an act which vests a title or right will not be construed to relate back to a prior act so as to make the title or right take effect as of the date of the first act when the rights of third parties which would otherwise be valid, are affected by such relation.

In Case v. DeGoes, 3 Caines, 261, 263, the New York Supreme Court speaking through Mr. Justice Thompson, afterwards a Justice of this Court, says: "It is a general rule with respect to the "doctrine of relation that it shall not do wrong to "strangers" (16 Vin. Abr., 293). This rule is "fully recognized in Menvill's case (13 Coke., 21), "where it is said, 'That by relation a thing may " 'be considered as annulled *ab initio*, betwixt the " 'same parties to advance a right, but the law will " 'never make such a construction to advance a " 'wrong or to defeat collateral acts which are law- " 'ful, and principally if they concern strangers.' " We contend that here the Court should not annul

the lien *ab initio* by *constructive* relation for the purpose of advancing the right of the trustee, when its effect will be to cut off the right which the debtor has obtained to have his debt satisfied by the sale, and the right of the creditor to the proceeds of such satisfaction.

In Johnston v. Jones, 1 Black, 210, 221, this Court says: "The doctrine of relation is a legal "fiction, intended to promote the ends of justice. "It is a general rule, that it shall do no wrong to "strangers. It is applied with vigor between the "original parties where justice so requires, but it is "never allowed to defeat the collateral rights of "third persons lawfully acquired (4 J. R., 234, "Jackson v. Bard; 3 Caines Rep., 262, Case v. De "Goes; 18 Vin. Abr., 287, Relation, B; 13 Coke, "21, Menvill's case; 7 Ohio. S. R., 291, Wood v. "Furgeson)."

"This limitation of the fiction of relation so as "to prevent it from doing injury to strangers or "defeating *mesne* lawful acts is the common lan- "guage of the books and it received a very par- "ticular illustration by Lord Hardwicke in the "case of Marlborough v. Godolphin, 2 Ves., 78. "He admitted the principle, that where a person "takes by execution of a power, he takes under "authority of the power; but there was no case, "he said, to maintain that he must take by rela- "tion, from the time of the creation of the power. "* * * These executions of power, says Lord "H., do not refer back, like assignments in com- "missions of bankruptcy, for the latter refer back "*by force* of the *Statutes of Bankruptcy* to avoid "mesne wrongful acts."

Jackson v. Davenport, 20 Johns., 537, 551-552.

The bankruptcy cases to which Lord Hardwicke refers are those where the Courts have been compelled to hold the title of the assignee in bankruptcy to relate back so as to cut off the intermediate rights of sheriffs, creditors, and purchasers by force of the *express* language of the bankruptcy law. Such language was contained in the Act of 1867, Sec. 14. *There is none in the present act.* Where the right of relation has been claimed by construction or implication only, under the bankruptcy acts, the Courts have uniformly refused to make any such construction to the injury of third parties. Thus in Rathbone v. Blackford, 1 Caines, 588, 590 (decided in 1803), the Supreme Court of the State of New York refused to apply the doctrine to the Bankrupt Act of 1800, because the Act did not contain words clearly expressive of such an intention on the part of Congress. The Court there say: "This relation to the moment of "committing an act of bankruptcy is considered as "one of the hardest cases of which the English law "admits, but was thought necessary to secure "creditors against fraudulent dispositions of their "property by bankrupts, whether by their own "acts, or under color of legal process (Per Lord "Hardwicke in Billion v. Hyde, 1 Ves., 328). It is "certain that men in tottering circumstances have "too much temptation as well as opportunity of "defeating their creditors of an equal distribution "of their effects. But while interposing checks "against practices of this kind, *we should be careful not unnecessarily to adopt fictions which "may operate with severity on other persons as "well as the bankrupt.*"

In Higgins v. McAdam, 3 Y. & J., 1, 10 (decided in 1829), the Court refused to make a construction of the English Bankrupt Act, which would cause the title of the assignee to relate back so as to cut

off the intervening rights of a creditor, claiming under a prior execution sale, to the proceeds thereof, the Court saying: "The relation back to any ante-"cedent period to make an act of bankruptcy, is a "case *strictissimi juris*, and ought not to prevail, "except where the words of the statute upon which "that construction is to be found, are clear and "without doubt. I do not know how to insert "words of relation in that part of the clause in "which the Legislature has omitted them."

The doctrine of relation in reference to the Act of 1867 was pressed upon this Court in the case of Conner v. Long, 104 U. S., 228, but the Court refused to assert any such principle and repudiated a long line of English decisions which had decided that under the Bankrupt Act of 13 Eliz. Ch., 7, the title of the assignee would relate back to a prior act of bankruptcy and make the Sheriff and the execution creditor wrongdoers for all intervening acts done by them under the execution although in good faith. The Court held that those decisions were a departure from the common law, and that the Bankrupt Act of 6 Geo., 4, ch. 16 (enacted in 1825), hereinbefore referred to, which established a different rule, was merely a legislative reversal of the decisions of the English Courts, and did not so much change as restore the law (*Id.*, 241-244).

We therefore feel fully justified in asserting that since subdivision "f," Sec. 67, does not contain express words of relation it should be construed to have reference only to liens existing at the date of the adjudication, and not to those which have become extinguished by prior sale, since the effect of the contrary construction would be to make an innocent Sheriff a wrongdoer, and deprive a *bona fide* and diligent creditor of a pay-

ment of his debt duly obtained before the bankruptcy proceedings through the remedy given to him by the law.

(*c*) *The retroactive construction makes Sec. 67, subdivision f, conflict with Sec. 60, subdivisions a and b.*

That the construction given by the Court below is incorrect, is shown by Sec. 60, paragraphs *a* and *b* of the act, which are as follows: "Sec. 60. Preferred Creditors.—(*a*) A person shall be deemed "to have given a preference if, being insolvent, *he* "*has procured or suffered a judgment to be entered* "*against him in favor of any person*, or made "a transfer of any of his property, and the effect "of the *enforcement of such judgment* or transfer "will be to enable any one of his creditors to obtain "a greater percentage of his debt than any other of "such creditors of the same class.

"(*b*) If a bankrupt shall have given a preference within four months before the filing of a "petition or after the filing of the petition, and "before the adjudication, and the person receiving "it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to "believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and "he may recover the property or its value from "such person."

If the reasoning of the Circuit Court of Appeals is correct, it was unnecessary and useless for Congress to enact Sec. 60, paragraphs a and b. Their effect is that the *enforcement of a judgment* obtained against a debtor within four months prior to the filing of the petition in bankruptcy against him shall be "*voidable by the trustee*" only in certain contingencies; first, if it be procured or suffered by the debtor to be entered against him;

second, if the effect of the enforcement of such judgment will be to give the judgment-creditor a preference; third, if the debtor intended thereby to give the creditor a preference; and fourth, if the creditor should have had reasonable cause to believe that it was intended thereby to give a preference. Now, the only way in which a *judgment* for the recovery of a debt can be "enforced" is, by the issuance of an execution, a levy of the same upon property creating a lien thereon, a sale of the property, and a payment of the proceeds thereof to the judgment creditor. If the mere fact that all of these steps were taken within four months prior to the filing of the petition in bankruptcy, renders all the proceedings "null and void" and makes the creditor and the Sheriff both liable to refund the money received by them to the trustee, then Sec. 60, so far as it refers to judgments, is absolutely unnecessary and ineffective.

In fact, if the Circuit Court of Appeals is correct, Sec. 60, subdivisions "a" and "b" are repealed by Sec. 67, subdivision "f," for the same reasons which moved the U. S Circuit Court of Appeals for the Seventh Circuit to decide that Sec. 67 c, which relates to the dissolution of judicial liens, was also repealed by subdivision f, and those reasons were that the respective provisions were antagonistic and irreconcilable, and that therefore, in any case of conflict between them, the former must give way and the latter prevail (*In re* Richards, 96 Fed. Rep., 935). This Court, however, in the case of Pirie v. Chicago Title & Trust Co., 182 U. S., 348, regarded those subdivisions of Section 60 as being in full effect. In that case Mr. Justice McKenna says: "Subdivisions 'a' and "'b' are concerned with a preference given by a "debtor to his creditor. Subdivision 'a' defines "what shall constitute it, and subdivision 'b' states

"a consequence of it—gives a remedy against it. "The former defines it to be a transfer of property "which will enable him to whom the transfer is "made to obtain a greater percentage of his debt "than other creditors. The latter provides a con- "sequence to be that the transfer may be avoided "by the trustee of the property or its value re- "covered, provided, however, that the preference "was given four months before the filing of the "petition in bankruptcy or before the adjudica- "tion, and the creditor had reason to believe that "a preference was intended. So far, so clear. If "the conditions mentioned exist, the preference "may be avoided. But if the person receiving the "preference did not have cause to believe it was "intended, what then? It follows that the con- "dition being absent, its effect will be absent. *In "other words, he may keep the property trans- "ferred to him, whether it be a complete or partial "discharge of his debt*" (446-447).

It is true that the learned Justice speaks in this quotation only of transfers of property, but "transfer of property" is inseparably connected in subdivision "a" with "judgment," and if he had supposed that the portion relating to judgments was repealed by Sec. 67 f, he would undoubtedly have stated that fact. In the recent case of Wilson Brothers v. Nelson, decided by this Court (7 Am. B'k'y Rep., 142), Sec. 60, subdivisions "a" and "b" are regarded as in full force and effect.

(*d*) *Sections 67 "f" and 60 "a" and "b," should be so construed as to stand together.*

That construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used, should be rejected if

an interpretation can be found which will give it effect (23 Am. & Eng. Ency. of Law, 309, 1st Ed.).

It is not competent for this Court to reject or disregard a material part of an Act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together (Rice v. Minnesota & N. W. R. R. Co., 1 Black., 358).

Statutes must be so construed as to admit all parts of them to stand if possible (Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U. S., 634).

It is a cardinal rule of statutory construction, that significance and effect shall, if possible, be accorded to every word, and that every part of the statute must be construed in connection with the whole, so as to make all the parts harmonize and give meaning to each (Washington Market Co. v. Hoffman, 101 U. S., 112).

No statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction (Cope v. Cope, 137 U. S., 682)

Statutes should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it (Bernier v. Bernier, 147 U. S., 242).

In Peck v Jenness, 7 How., 612, 623, Mr. Justice Grier says, with reference to the Bankruptcy Act of 1841: "But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the Legislature. One portion of a statute should not be construed to annul and destroy what has been clearly granted by another. *The most general and absolute terms of one section may be qual-*

ified and limited by conditions and exceptions contained in another, so that all may stand together."

The above canons of construction can only be applied and enforced in this case by construing Sec. 67, subdivision *f*, as referring only to judicial liens which are in existence at the date of the adjudication of bankruptcy, and Sec. 60, subdivisions *a* and *b*, as relating to such liens, which, prior to such adjudication, have in the progress of the enforcement of the judgments there mentioned, passed through the stage of sale. This construction will give each subdivision full and complete effect and will be in harmony with the language therein contained. If the Court should construe Sec. 67, subdivision *f* as applying to execution and judgment liens which have already become *functus officio* by a sale, it will bring it in conflict with Sec. 60, subdivisions *a* and *b*.

The differences between them are irreconcilable because the one avoids liens from the mere facts of their existence and of their having been obtained within the specified time, whereas the other avoids them only in the event of certain conditions being interposed. The later one must therefore repeal the other under the construction given to Sec. 67, subdivision *f* by the Courts below. It is very clear, however, that it was not the intention of Congress to repeal Section 60, as applied to the enforcement of judgments, but to have it stand in conjunction with Section 67, subdivision "*f*."

The District Judge who decided the case below, evidently does not agree with the Circuit Court of Appeals that the levy if obtained within the inhibited time is *ipso facto* null and void and fails to support the subsequent proceedings consequent thereon, for in a later case he decided that where a Sheriff had paid over the money made by a sale

under such a levy to the execution creditor before the filing of the petition, the trustee could not recover it from the creditor unless the transaction came within the provisions of Sec. 60, paragraph *b*, as an illegal preference. *In re* Blair, 102 Fed. Rep., 987. This decision was undoubtedly correct.

Judge Brown, in that case, fell, however, in our opinion, into two errors; 1st, in regarding the filing of the petition and not the adjudication as the event which terminates the right of the creditor to proceed any further with his execution; 2d, in not perceiving that the creditor's rights are fixed, beyond the interference of the bankruptcy proceedings by the prior execution sale and not alone by the payment to him by the Sheriff.

(*c*) *The trustee can take no rights through his injunction order.*

It may be claimed by the trustee that this money had not been paid over by the Sheriff even at the date of the adjudication. Our contention on this point is, that if such payment be necessary to fortify the right of the execution creditor against the claims of the trustee (which we do not concede), the trustee cannot take advantage of it in this proceeding, because it was his act, or rather that of the creditors who filed the petition in bankruptcy and whom he represents, which prevented the payment over, by their obtaining at the inception of the proceedings, an injunction from the District Court restraining the Sheriff from paying over the money to the execution creditor. The object of an injunction is to preserve rights, not to *create* them. No court by an injunction can create rights in favor of the party obtaining the injunction, which he would not otherwise have by operation of law. The Sheriff, at the time of the filing of the petition in bankruptcy was ready to pay

over the money, an injunction of the State Court which had theretofore prevented him from doing so having been dissolved; but before an order to that effect could be entered, the U. S. District Judge issued his injunction preventing such payment (Rec. 28-29). For the purposes of this proceeding, the Sheriff must therefore be considered as having immediately after the filing of the petition in bankruptcy, and before the service of the restraining order, and consequently before the adjudication, paid over the money in question to the creditor.

(*f*) *The maxim, expressio unius est exclusio alterius, applies.*

If subdivision "*f*" had contained no more than the general condemnation of judicial liens obtained within the prescribed time, which ends with the words "in case he as adjudged a bankrupt," there might be some doubt as to the proper construction. The Legislature, however, by continuing the sentence and proceeding to provide for the case of liens which exist at the time of the adjudication, and enacting that the property affected thereby, or, in the discretion of the Court, the lien itself should pass to the trustee, has thereby by implication asserted its intention that liens not then existing, but previously executed by sale, should not be affected by the adjudication. It presents a case for the application of the rule of interpretation, *Expressio unius est exclusio alterius*, which "is an universal maxim in the construction of statutes." United States v. Arredondo, 6 Pet., 691, 725.

In Herring vs. N. Y. L. E. & W. R. R. Co., 105 N. Y., 340, 389, the Court for example in discussing the question whether the New York Code of Procedure permitted injunctions and receivers *before* judgment in a certain class of actions, said:

"Section 444 made special provision for injunctions "and receivers *after* judgment, and thus forbade them by implication at an earlier stage of the action. The maxim *expressio unius exclusio alterius* applies."

In like manner we urge that since there existed the same necessity that Congress should provide remedies for the trustee, in the case of liens already *functus officio*, before the adjudication, as in the case of liens existing at the time of the adjudication, the fact that it provided for the latter and not for the former makes it a case for the application of the maxim, and shows that Congress did not intend to avoid liens discharged by sale before the adjudication.

(g) *Every bankrupt act which destroyed the rights of creditors gave remedies to the trustee.*

This consideration is strengthened by the fact that in every Bankrupt Act ever passed by Congress, including the present Act—excepting the Act of 1800, which did not avoid anything—whenever a provision has been made for avoiding a transaction of the bankrupt, a remedy has been expressly given to the assignee or trustee in reference to the matter. Thus Section 2 of the Act of 1841 avoided all payments, securities, etc., made or given by a bankrupt in contemplation of bankruptcy or for the purpose of preference, and expressly authorized the assignee to sue for and recover the same. This Section was enforced in Shawhan v. Wherritt, 7 How., 627. Section 35 of the Act of 1867 avoided all preferences given within four months prior to the filing of the petition, and expressly authorized the assignee to sue for and recover the property which was the subject of the preference, or its value. The enforcement of this section is illustrated in Michaels v. Post, 21 Wall.,

398. Section 60 of the present Act, which avoids similar preferences, gives a like remedy to the trustee, and Section 67, subdivision *f*, which avoids judicial liens obtained within four months prior to the commencement of the bankruptcy proceedings, gives a remedy to the trustee when the lien exists at the date of the adjudication.

(*h*) *The present Act gives no remedy as to judicial liens extinguished before the bankruptcy proceedings.*

In view of this policy of Congress thus repeatedly and constantly carried out, it is not too much to say that if it had intended that such liens should be avoided, when they had already become perfected by a sale and the proceeds thereof were in the hands of the creditor or of the Sheriff before the filing of the petition, it would have expressly given a remedy to the trustee to sue for and recover such proceeds. We therefore assert that its failure to give such a remedy affords conclusive evidence that it did not intend that liens thus perfected and extinguished by sale should be avoided by the bankruptcy proceedings subsequent to such sale.

IV.

Every provision of Sec. 67, Subdivision f, shows that the words "null and void" have no retroactive effect.

The first line of the subdivision avoids judgments and attachments by name, for the reason, doubtless, that the direct operation of an attachment or judgment upon the property of the debtor is to fix a lien thereon and no more. The intention of the subdivision is to avoid merely the *lien* of the attachment or judgment. (Doyle v. Heath, 4 Am. Bky. Rep., 705; *In re* Beaver

Coal Co., 6 *Id.*, 404.) When Congress came, however, to the subject of executions, it did not mention *them*, but only levies. The object of an execution is not only to fix a lien upon property, but to transmute the same into money for the purpose of satisfying the judgment on which the execution is based. As the intention of Congress was merely to avoid liens, existing at the date of the adjudication, it purposely omitted the word "executions," and only specified "levies" whose only effect is the fixing of a lien. Had Congress intended to make the adjudication retroactive and to avoid everything that had been done under the execution before that time, it would have enacted that all "executions" issued or levied within the prescribed four months should be null and void. Its failure to mention executions, shows to a demonstration, that it did not intend to interfere with an execution which already advanced beyond the stage of the "levy," and had been completed by a sale.

This point was expressly ruled by the Circuit Court of Appeals for the Fourth Circuit, in Botts v. Hammond, 99 Fed. Rep., 916. In that case there had been an attachment of personal property in the State court, a sale thereof under order of the Court, a judgment obtained against the attachment debtor and the proceeds distributed to the attachment creditors. The judgment was entered and the distribution had less than a month before the commencement of proceedings in bankruptcy and less than two months before the adjudication. The Court say at page 919, speaking of subdivisions "*e*" and "*f*" of Section 67: "Both of these subdi-"visions deal with the lien as existing. But in "the case before us the lien had been merged in "the judgment; the property had been sold under

"lawful orders of the Court, having full jurisdiction; "the money has been distributed and the lien "gone. There is nothing upon which the subdivis- "ions of this section can act or to which these pro- "visions can apply."

The further provision in subdivision "*f*" that "*the right under such levy*, judgment, attachment "or other lien shall be preserved for the benefit of "the estate and thereupon the same may pass to "and shall be preserved by the trustee for the ben- "efit of the estate," shows that the entire subdivision had nothing to do with liens exhausted by sale before the inception of the bankruptcy proceedings. In the case of such liens "the Sheriff is substituted for the debtor" (Higgins v. McAdam, 3 Y. & J. 1, 13; Morland v. Pellatt, 8 B. & B. 722, 727), and the right to proceed against the Sheriff as the sole debtor is not a "right under the levy" or other lien, even though such lien has once existed in the course of the proceedings which led to the sale. A "right under the levy" can only mean a right to proceed with the further enforcement of an existing levy, and not a right to sue the sheriff for money had and received (which is a right on the *sale*) except by a very strained and forced construction.

Moreover, there is nothing in the right to sue the sheriff that needs to "be preserved," as it exists until satisfied by payment to the creditor, and it is only extinguished after such payment. It will hardly be contended that the subdivision means that after and notwithstanding the payment by the sheriff to the creditor, the right against the sheriff shall be preserved to the trustee so as to make the former pay the debt twice. The meaning is that an *existing lien* may be preserved, and shall not become null and void.

Further confirmation of our views is afforded by the next sentence of subdivision "*f*:" "And the "Court may order such conveyance as shall be "necessary to carry the purposes of this section "into effect." This obviously refers to a conveyance by the creditor and not by the debtor. A conveyance by the latter would not transfer any right under the levy or other lien, and in fact would not transfer anything which was not already vested in the trustee by the provisions of Section 70. Now if the creditor has already received the money from the sheriff, he is, under the ruling of the Circuit Court of Appeals, liable to the trustee. Did Congress mean that he must "convey" a right of action against himself? It is clear that that case is not within the "purposes of the section." Yet it must be evident that if Congress had had in view liens already extinguished by a sale, it would have provided a remedy for that contingency also.

We come next to a case like the present where the sheriff still holds the money. Undoubtedly, there, the creditor has his right of action against the sheriff which he can "convey." Did Congress mean that that right should be "preserved" and "conveyed" and should "pass to the trustee?" If that be the case, the unlucky creditor loses his original debt against the bankrupt entirely, for the creation of the right of action against the sheriff has paid the debt against the original debtor either totally or partially so that when he is ordered to convey his right of action against the sheriff to the trustee, he will have nothing left.

Under our construction of subdivision "*f*" which makes it apply only to the case of liens existing at the time of the adjudication, the creditor although he loses his lien still retains his debt and can prove it in bankruptcy. Under the construction insisted on by the trustee he must lose the

debt entirely because his right of action against the sheriff cannot be "preserved" for the benefit of the estate, and yet at the same time be "deemed null and void" for his own benefit as against the original debtor. We must therefore conclude that Congress did not have in mind a case like the present in declaring liens null and void in subdivision "*f*," otherwise, in providing for the conveyance by the creditor of his right of action against the sheriff for the money in his hands, it would have made some provision to protect the former and resurrect his original debt against the bankrupt.

Subdivision "*f*" must therefore mean that only liens existing at the time of the bankruptcy, and not those already extinguished by sale, are to be either "deemed null and void" on the one hand, or "preserved" and "conveyed" on the other.

V.

The proviso to subdivision "f" of Section 67 does not militate against the construction of the petitioner.

This clause is as follows: "Provided, that noth-"ing herein contained shall have the effect to de-"stroy or impair the title obtained by such levy, "judgment, attachment, or other lien, of a *bona* "*fide* purchaser for value who shall have acquired "the same without notice or reasonable cause for "inquiry." The learned Courts below considered this proviso as decisive of the question in controversy, and as showing that Congress had in mind liens already extinguished by sale before the adjudication or filing of the petition in bankruptcy, and that the purchaser referred to is one who has bought at such a prior sale. We contend, however, that it plainly refers to a sale taking place *after the adjudication*, and as saving the rights of

purchasers for value who buy without notice of or reasonable cause for inquiry in reference to the adjudication.

It was proper and just for Congress to provide for such a contingency, for it might well happen that after an adjudication had been made in one state, an execution sale under a previous levy might take place in some distant state, and some innocent person without notice of the bankruptcy proceedings be entrapped into making an invalid purchase. In fact, such cases often occurred under the Act of 1867.

The use of the words, "without notice or reasonable cause for inquiry" shows that Congress did not have in mind in the proviso a sale occuring *before* the proceedings in bankruptcy, for how can a purchaser be held to have notice of or reasonable cause for inquiry with reference to an event that has never occurred, or of a thing which does not exist?

The Supreme Court of Maine, has held that the proviso to Sec. 67, "*f*" applies to a judicial sale occurring *after* the adjudication and protects an innocent purchaser but not the sheriff. Jones v. Stevens, 5 Am. Bktcy. Rep., 571.

It was not necessary for Congress to make a provision protecting an innocent purchaser at an execution sale made before the commencement of the proceedings in bankruptcy. Such sale would confer a right on the purchaser which it would be beyond the constitutional power of Congress to divest through the intervention of proceedings in bankruptcy subsequently commenced. A provision depriving an innocent purchaser for value of his rights in that manner, would deprive him of his property without due process of law within the meaning of the fifth amendment to the Constitution. The proviso, therefore, cannot be considered as applying to the case of such a purchaser.

The Act of 1867, Sec. 14, which provided for the dissolution of attachment liens, created within four months before the filing of the petition in bankruptcy, did not contain any saving in favor of innocent parties purchasing at an attachment sale, such as is often made before judgment in the case of perishable property. It was held in Conner v. Long, 104 U. S., 228, that where such sale occurred *after* the filing of the petition in bankruptcy, the purchaser was not protected; he was, however, saved harmless if the sale occurred *before* that event. The Act of 1867 in this respect therefore caused injustice to subsequent *bona fide* purchasers, and it was to prevent such injustice that the proviso to subdivision "f" of Sec. 67, in the present act was enacted. Mr. Justice Matthews says in Conner v. Long, *supra*, at page 231: "One consequence is, "that if property of the debtor, levied on under "such an attachment, has been sold prior to the "filing of the petition in bankruptcy, but there- "after the proceeds of the sale remain in the hands "of the sheriff, or have been applied before the "assignment to the payment of the judgment in "the attachment suit, the rights of the assignee "attach to the money and cannot follow the prop- "erty sold, for not being subject to the attachment "at the commencement of the bankruptcy proceed- "ings, the title *to the attached property is not "thereby transferred to the assignee;* but the at- "tachment being dissolved upon that event, the "right to the proceeds of the sale passes under the "assignment, released from the claims of all parties "to the attachment suit, as of the date of the "commencement of the proceedings in bankruptcy. "And in such a case the plaintiff in the attachment "suit, having received the proceeds of the sale on "his judgment, would be liable to an action by the "assignee for that sum of money had and received

"to his use; or, if it remained in the hands of the "sheriff, the assignee might become a party to the "action and obtain an order of the Court requiring "the amount to be paid directly to himself.

"Another result is, that if the property has been "sold under the attachment *after* the commence- "ment of the bankruptcy proceedings, *no title* "*passes by the sale*, for the property ceased, at "that time, to be the property of the bankrupt and "became the property of the assignee, a stranger "to the action and not affected by it; and both the "plaintiff in the attachment *and the purchaser at* "*the sheriff's sale*, would be liable to the assignee "for a conversion of his property; the one for hav- "ing caused its sale, *the other for having taken* "*possession of it as owner.*"

The observation of Mr. Justice Matthews, that where the property levied on under an attachment is sold by order of Court, the proceeds take the place of the property sold, does not apply to the case of an execution. In the case of an attachment the proceeds of the sale remain in the hands of the sheriff subject to the lien of the attachment which is conditional and dependent upon the rendition of judgment in favor of the creditor. Miller v. Bowles, 58 N. Y., 253, 256 (Decided under the Act of 1867). Pratt v. Law, 9 Cranch, 456, 497.

The attachment creditor's rights to such proceeds before judgment are exactly the same as they were with reference to the property attached before it was sold. In the case of an execution however, the sale absolutely at once satisfies the debt, and the right of the creditor to the proceeds in the hands of the sheriff is complete.

In Duffield v. Horton, 73 N. Y., 218 (cited in Conner v. Long, *supra*), a debt due the bankrupt had been attached before the filing of the petition,

and was paid by the debtor of the bankrupt to the sheriff *after* that event and before the assignment in bankruptcy, in good faith and without actual notice of the filing of the petition. He was obliged to pay it again to the assignee however as he had constructive notice of the bankruptcy proceedings by operation of law. Can it be doubted that if the payment had been made before the filing of the petition, the result would have been otherwise?

VI.

The creditor's rights under a prior execution sale are not opposed to the object of the Bankrupt Law.

There is nothing in the object of the Bankrupt Act which militates against our contention. The purpose of that Act is, to use the language of the Court in Clark v. Iselin, 21 Wall., 360, 377, in reference to the Act of 1867, "to secure equality of "distribution of that which insolvents have when "proceedings in bankruptcy are commenced, and "of that which they have collusively with some of "their creditors attempted to withdraw from rata-"ble distribution, with intent to prefer some "creditors over others."

Congress has seen fit to go further in the present law, than it did in that act or in any other previous act, and has enacted that the debtor's property existing at the time of the adjudication should go to the trustee free from any liens then existing obtained through legal proceedings within four months prior to the bankruptcy. But there is nothing in the letter or spirit of the act which evidences an intention on the part of Congress to take away from an innocent creditor that which has completely effectuated a payment of his debt, and in good faith become his own property through

the remedies which the laws give him prior to the filing of the petition in bankruptcy. Nothing but the clearest and plainest expression of the will of Congress should prompt the Court to take away from a creditor that, which the law and the facts, as they existed at the time, have made his own and to compel him to divest him of his own property in favor of the trustee in bankruptcy, by reason of facts occurring afterwards, and which were perhaps unsuspected and undreamed of at the time when the money was collected by the Sheriff. In Pirie v. Chicago, T. & T. Co., 182 U. S., 438, this Court construed the intention of the act to be, that a creditor should not be deprived of a payment received by him in good faith from the debtor although the latter was insolvent unless he desired to prove the balance of his claim. There is no reason why Congress should have entertained a different view with reference to a payment obtained in good faith through legal proceedings, and there is nothing in the act which can support an assertion that it entertained any such view.

VII.

The decrees of the U. S. Circuit Court of Appeals and of the U. S. District Court should be reversed, and the latter Court directed to order restitution by the trustee of the money obtained by him from the Sheriff to the execution creditor Clarke.

Respectfully submitted,

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